IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GORDON ELECTRONICS CORPORATION d/b/a
TELEMONITOR OF LIBERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

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No. 311

CONLEY ELECTRONICS CORPORATION d/b/a TELEPROMPTER OF LIBERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-32) is not yet reported. The memorandum opinions and orders of the Federal Communications Commission (R. 46-49, 130-133) are reported at 7 F.C.C. 2d 120 and 8 F.C.C. 2d 473.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on April 22, 1968. The petition for a writ of certiorari was filed on July 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's rule prohibiting CATV systems, on request of a local station licensee, from duplicating on the same day any program broadcast by such licensee is a violation of the free speech guarantee of the First Amendment.

2. Whether, in the circumstances of the instant case, the Commission was required to hold an evidentiary hearing on petitioner's request for waiver of the general non-duplication rule.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, the Administrative Procedure Act, 5 U.S.C. 554, the Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, and of the rules of the Federal Communications Commission, 47 C.F.R. 74.1103 and 74.1109, are set forth in the Appendix to the petition (Pet. App. 46-56), and in the Appendix, *infra*, pp. 13-14.

STATEMENT

In 1966 the Federal Communications Commission asserted jurisdiction over all community antenna

television (CATV) systems, and adopted regulations designed to accommodate the interests of both the rapidly expanding CATV industry and local television broadcast stations. Second Report and Order, 2 F.C.C. 2d 725. Late last Term, in *United States* v. *Southwestern Cable Co.*, Nos. 363 and 428, 1967 Term, decided June 10, 1968, this Court unanimously upheld the Commission's assertion of jurisdiction to regulate CATV systems in the public interest. Among other things, the newly promulgated rules carried forward, with some revision, certain measures governing the carriage of local signals and the non-duplication of the programming of local stations which had previously been applied to CATV systems served by microwave radio facilities. First Report and Order, 38 F.C.C. 683; *United States* v. *Southwestern Cable Co.*, *supra*, slip. op., p. 8.

Essentially, the Commission found that the impact of CATV on local stations could, if unchecked, disrupt and seriously impair the nationwide system for the allocation of television channels. Recognizing that CATV performed a valuable supplemental service, the Commission concluded that the potentially adverse impact of such systems on local television stations would be "ameliorated" if the systems were required to carry the programs broadcast by the local station and were not allowed to duplicate those programs on the same day by carrying more distant stations providing the same programs. In the Commission's considered view, these provisions would "create reasonably fair and open conditions for competition between CATV and broadcasting stations as alternative ways

of making television programs available to the public" (38 F.C.C. at 713).[1]

Conley Electronics Corp. is the operator of a CATV system in Liberal, Kansas. It carries the signals of three local stations, and, through the use of microwave facilities licensed to a sister corporation, Teleprompter Transmission of Kansas, Inc.,[2] imports three television signals from Amarillo, Texas, some 140 miles distant. The non-duplication rule, contained in 47 C.F.R. 74.1103, requires that petitioner delete those programs from the Amarillo stations which duplicate the programs shown by the local Kansas stations if they are broadcast on the same day.[3] Con-

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[1] The non-duplication protection applies to "prime time" network programs (*i.e.*, those presented by the networks between 6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Furthermore, a local station is only entitled to non-duplication protection on a CATV system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *" (47 C.F.R. 74.1103(e)). Finally, the CATV system need not delete carriage of a network program if, in doing so, it would leave available for reception of subscribers, at any time, the programs of less than two networks, or would deprive them of color reception of the program (47 C.F.R. 74.1103(g)).

[2] Teleprompter Transmission of Kansas, Inc., is a microwave common carrier serving petitioner. Its microwave system relays the signals of the Amarillo stations to a point where they are received and retransmitted by petitioner to its subscribers. Under the Commission's rules Teleprompter Transmission of Kansas, Inc., must include a recitation of the carriage and non-duplication rules in the tariff it files with the Commission.

[3] This does not result in any loss in viewing to the subscriber since the same program emanating from one of the nearby Kansas stations is carried by petitioner's system.

ley and its associated microwave carrier sought a waiver of the non-duplication rule, as provided for by 47 C.F.R. 74.1109, so as to permit the system to continue to carry the Amarillo signals (R. 1-22). That request was based upon the grounds, *inter alia*, that there was no showing of adverse impact on the local Kansas stations, that complying with the rule might have an adverse financial effect upon petitioner's system and might lead to a disruption of service, and that the rule should not in any event be applied without first holding a hearing.

Following the submission of pleadings, the Commission, finding it unnecessary to conduct an evidentiary hearing, denied the request for a waiver (Pet. App. 33-36; R. 46-49), and also subsequently denied a petition for reconsideration (Pet. App. 37-40; R. 130-133). It stated that the reasons for applying the non-duplication rule without a specific showing of adverse economic impact on the local station had been carefully explained in the First Report and Order, 38 F.C.C. at 713-714, and that Conley had supplied no factual support for its allegation of disastrous financial impact or potential disruption of service. The Commission also rejected petitioner's general challenge to the Commission's authority to issue the rules, and, finally, concluded that no facts had been presented to it which demonstrated the necessity for an evidentiary hearing.

The court of appeals sustained the Commission's ruling (Pet. App. 21-32). It rejected petitioner's First Amendment claim on the ground that it had not been presented to the Commission and therefore

"comes too late" (*id.* at 27). It noted, moreover, that the free speech argument was "without merit" since the non-duplication rule involves "reasonable regulation in the public interest" *(ibid.)*. Turning to the Commission's denial without hearing of petitioner's request for a waiver of the non-duplication rule, the court below concluded that "when rules of general application are promulgated in a valid rule-making proceeding, as was done here, they may be generally applied by the Commission without individual adjudicatory hearings unless a party, claiming to be aggrieved, sets forth reasons why the public interest would be served by an individualized waiver of the rule" (*id.* at 30). Since petitioner had not stated any reasons which would require the Commission to grant a waiver, the court determined, no hearing was required and no violation of due process resulted from the Commission's denial thereof.[4]

ARGUMENT

The decision of the court below is in accord with those in other circuits and is clearly correct. Neither of the questions presented is sufficiently novel or important to warrant further review.

1. There is no merit to the claim that the non-duplication rule violates petitioner's rights under the First Amendment. Initially, as the court below cor-

[4] In addition, the court below determined that the non-duplication rule, adopted as an integral part of the Commission's assertion of jurisdiction over CATV generally, was a valid exercise of the Commission's authority (Pet. App. 26), a holding which is completely in accord with this Court's subsequent decision in *Southwestern Cable.*

rectly held, the argument was not timely because it was not raised before the Commission.[5] Arguments not presented to the Commission initially cannot be raised subsequently on judicial review. 47 U.S.C. 405; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143; *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Presque Isle TV Co., Inc.* v. *Federal Communications Commission*, 387 F.2d 502 (C.A. 1). In any event, the Commission's rule is a valid exercise of its authority under the public interest standard of the Communications Act and as such does not contravene the First Amendment. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227.[6]

In affirming the Commission's jurisdiction over CATV systems, this Court concluded in *Southwestern Cable* that the Commission may issue "such rules * * * and prescribe such restrictions and conditions"

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[5] Petitioner suggests (Pet. 7) that the court of appeals erred on this point since the argument was raised below, citing R. 3 of the proceedings before the Commission. We find no reference to the First Amendment there, but only a general inclusion by reference to an entire adjudicatory proceeding which had been concluded prior to the initiation of the instant request for a waiver of the non-duplication rule.

[6] During the extensive rulemaking proceeding which culminated in the Commission's assumption of jurisdiction over all CATV systems and the promulgation of its rules and regulations in this regard, thorough consideration was given by the agency to the free speech issues which were allegedly raised by its proposed action. Indeed, in rejecting the view that the restrictions on CATV service which it prescribed impinged on the First Amendment, the Commission relied on the same authorities invoked here by the court below (see Reconsideration of Second Report and Order, 6 F.C.C. 2d 309, 310-312, set out at Pet. App. 41-43).

as are reasonably ancillary and necessary to the effective performance of its responsibilities with respect to the regulation of television broadcasting (slip op., p. 20).[7] One of the regulations adopted by the Commission is section 74.1103(e), the non-duplication rule at issue here. Under that rule CATV subscribers may receive as wide a range of programming as the physical facilities of the system permit, but where the same program is broadcast on the same day by both a local and a distant station, the system may distribute only the signal of the local station. The purpose of the rule is to guard against the disruptive impact on the nationwide system of channel allocations[8] which CATV might otherwise have had by importing distant signals which duplicate those of local stations, thereby fragmenting their audiences and threatening their viability. Cf. *Southwestern Cable*, *supra*, slip op., pp. 17-18. Plainly, such a rule is "reasonably ancillary" to the Commission's statutory responsibilities. See, *e.g.*, 47 U.S.C. 151, 303(g), 303(h), 307(b).

The holding of the court below that the non-duplication requirement is consistent with the First Amendment accords with other cases in which the question

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[7] We of course recognize that the Court in *Southwestern* noted that "questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court" (slip op., p. 9). It is our submission, however, that, given the Commission's authority over CATV systems generally, which *Southwestern* definitively established, the particular rule here challenged is clearly a reasonable facet of the implementation of that jurisdiction.

[8] See *Logansport Broadcasting Corp.* v. *Federal Communications Commission*, 210 F.2d 24 (C.A.D.C.).

has been considered. In *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F.2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951, a non-duplication requirement imposed on an *ad hoc* basis prior to adoption of the present rule was found to be a "legitimate measure of protection for the local station and the public interest" and therefore not in violation of the First Amendment (321 F.2d at 364). See also *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, 387 F.2d 220 (C.A.D.C.); *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F.2d 729 (C.A.D.C.).[9]

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[9] Petitioner argues (Pet. 10-11) that each of these cases was concerned with broadcast licensing rather than regulation of unlicensed CATV systems. However, there is no dispute that petitioner relies on the licensed microwave facilities of its sister corporation to import the Amarillo signals; and while the microwave common carrier which served petitioner did not pursue its remedies in the court of appeals, it did join petitioner before the Commission. In any event, it is undeniable that CATV systems provide an extension of a broadcast service, and there is no reason why the free speech principles outlined above should apply differently to those systems which receive their signals off the air than to those using licensed radio. See Reconsideration of Second Report and Order, 6 F.C.C. 2d 309, 310. The public interest questions, as well as the alleged impact on free speech, are the same in both cases. Moreover, we note that the Eighth Circuit, in *Black Hills Video Corp.* v. *Federal Communications Commission*, Nos. 18,052 *et al.*, decided August 7, 1968, rejected the contention that the Commission's CATV rules violated the First Amendment, reasoning that "[t]he Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations." Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, holding that jur-

Finally, petitioner's reliance (Pet. 13) on this Court's decision in *Fortnightly Corp.* v. *United Artists Television, Inc.*, No. 618, 1967 Term, decided June 17, 1968, is misplaced. That case held that CATV carriage of television signals did not result in copyright infringement. Since the Commission's reference to "unfair competition" in the Second Report and Order (2 F.C.C. 2d at 778) obviously related to the fact that CATV systems, unlike the local stations, had not traditionally paid for the programming they provide, and since the effect of the *Fortnightly* decision is to maintain that situation, that holding perpetuates and indeed enhances the significance of this consideration. Thus, *Fortnightly* works no change in the assumptions on which the Commission's rules were premised, but rather confirms the propriety of the Commission's recognition of the significantly different situations of CATV systems and local stations as regards access to programming.

2. There is no merit to petitioner's contention that the Commission acted improperly in denying its request for a waiver of the non-duplication rule without first having held an evidentiary hearing (Pet. 14-17). It is well established that administrative agencies have authority to adopt and apply general rules applicable to a broad class of persons without conducting separate adjudicatory proceedings for each person affected, even where the regulatory statute requires a

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isdiction over a distribution process may reach to the end use even if that use is not specifically encompassed within the jurisdictional grant.

hearing before individual licenses or certificates may be modified. *Federal Power Commission* v. *Texaco*, 377 U.S. 33; *WBEN, Inc., et al.* v. *United States*, 13 Pike & Fischer R.R. 2d 2001 (C.A. 2), petitions for certiorari pending, Nos. 368, 369, 390, this Term; *American Airlines* v. *Civil Aeronautics Board*, 359 F.2d 624 (C.A.D.C.), certiorari denied, 385 U.S. 843; *California Citizens Band Association, Inc.* v. *United States*, 375 F.2d 43 (C.A. 9), certiorari denied, 389 U.S. 844. The fact that the rules require a modification of existing business practices is not significant. Almost all substantive rules adopted by regulatory bodies have that effect. See, *e.g.*, *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Metropolitan Television Co.* v. *Federal Communications Commission*, 289 F.2d 874 (C.A.D.C.); cf. *Permian Basin Area Rate Cases*, 390 U.S. 747.

In this respect, petitioner is in a position analogous to that of the respondent in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. The continued operation of its system is in violation of a duly adopted rule, and therefore, in requesting an exemption petitioner was obliged "to set forth reasons, sufficient, if true, to justify a change or waiver of the Rules" (351 U.S. at 205). Here the court below properly applied the *Storer* test and found that no reasons were set forth in the waiver request that would warrant an evidentiary hearing (Pet. App. 30). Thus, no denial of due process resulted (see *id.* at 30-32).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1968.

APPENDIX

Pertinent provisions of the Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, in addition to those set out in the Appendix to the petition, provide as follows:

§ 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

* * * *

§ 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station.

* * * *

§ 307. * * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * *

§ 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(d)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(d)(1) of this title, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petion for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special

order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402 (b) of this title in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or

case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

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